

**38 CFR Part 5****RIN 2900-AQ92****Administrative Procedures: Guidance Documents****AGENCY:** Department of Veterans Affairs.**ACTION:** Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is establishing in regulation its processes and procedures for issuing guidance documents. This final rulemaking will implement the mandates of Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

DATES: This rule is effective [insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Richard Murphy, Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 714-8507. (This is not a toll-free telephone number).

SUPPLEMENTARY INFORMATION: On October 9, 2019, the President signed Executive Order (E.O.) 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents.

Section 4 of the E.O. mandates that each agency finalize regulations to set forth processes and procedures for issuing guidance documents. This rule complies with that mandate by adding part 5 to title 38 Code of Federal Regulations (38 CFR part 5). Part 5 is titled “Administrative Procedures: Guidance Documents,” and informs the public about VA’s general processes and procedures for issuing guidance documents. Prior to this rulemaking, VA has not previously published procedures relating to the issuance of guidance documents.

5.0 Purpose.

VA is stating the purpose of part 5 in § 5.0, which is to provide VA's processes and procedures for issuing and managing guidance documents in accordance with E.O. 13891. Section 4 of the E.O. requires each agency to finalize regulations or amend existing regulations to set forth processes and procedures for issuing guidance documents within 300 days of the date on which the Office of Management and Budget (OMB) issues an implementing memorandum under section 6 of the E.O.. OMB issued its memorandum, M-20-02, on October 31, 2019. Section 4 of the E.O.; shall require that each guidance document clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract; and shall include procedures for the public to petition for withdrawal or modification of a particular guidance document. For significant guidance documents, section 4 of the EO contains additional requirements. These include that there must be a period of notice and comment of at least 30 days and a public response from the agency to major concerns raised in comments, except when the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to public interest. Significant guidance documents must be approved on a non-delegable basis by the agency head or agency component head appointed by the President. They must be reviewed by OIRA under E.O. 12866 before issuance, and they must comply with applicable requirements for significant regulatory actions set forth in E.Os. 12866, 13563, 13609, 13771, and 13777.

5.10 Definitions relating to guidance documents.

Section 5.10 is the definitions section. The section generally tracks the requirements of E.O. 13891, as applied to VA. Because the definition of guidance document is broad, this rule clarifies that a guidance document is an agency statement of general applicability (i.e., it applies to more than just one person, event, or transaction), that is intended to have a future effect on the behavior or actions of regulated parties (to include non-VA actors), and that sets forth a policy on a statutory,

regulatory, or technical issue, or an interpretation of a statute or regulation. The section mirrors the exclusion in section 2(b)(i)-(vi) of the E.O. for those documents that VA does not consider guidance documents.

VA is mirroring the definition of significant guidance document to that provided in section 2(c) of the E.O. with minor clarifying edits.

VA is also defining VA to mean the Department of Veterans Affairs.

5.15 Procedures for issuing guidance documents.

VA is implementing the requirements of section 4(a)(i) and (iii) of the E.O. in § 5.15. We are stating the requirements of section 4(a)(i) in paragraph (a)(1) by stating that each guidance document must clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. VA is adding sample language of the disclaimer for guidance documents as follows: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Paragraph 5.15(a)(2) states the information that must be included in each guidance document. VA is stating that a guidance document must include the following information: the term guidance; the agency or office issuing the document; to what and to whom the document applies; the date of issuance; title and unique identification number of the document; citation to statutory or regulatory authority that the guidance document interprets or applies; a short summary of the subject matter covered at the beginning of the guidance document; the statement required under paragraph (a)(1) of this section; and as applicable, the guidance document being revised or replaced.

Paragraph 5.15(b) states the procedures for significant guidance documents as required in section 4(a)(iii) of the E.O. Significant guidance documents must follow the requirements provided in paragraph 5.15(a). Further, unless the Administrator of the

Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply to significant guidance documents. Paragraph (b)(1) states that VA will provide for a period of public notice and comment of at least 30 days before issuance of such significant guidance document and will provide a public response to major concerns raised in comments, except when VA for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. Paragraph (b)(2) states that the Secretary or a VA component head appointed by the President must approve any significant guidance document prior to issuance; in addition, pursuant to section 4(a)(iii)(B) of the E.O., this approval authority is not delegable. Paragraph (b)(3) establishes that significant guidance documents must be reviewed by OIRA under E.O. 12866 prior to issuance. Paragraph (b)(4) requires that significant guidance documents comply with the applicable requirements for regulations or rules set forth in E.O.s 12866, 13563, 13609, 13771, and 13777.

5.20 Procedures for petition for the withdrawal or modification of a guidance document.

Section 5.20 implements the requirements in section 4(a)(ii) of the E.O and states the procedures for the public to petition for the withdrawal or modification of a guidance document. Paragraph (a) provides the addresses for submitting such petitions. The email address is: OEIDMO@va.gov. The public may also submit requests via mail to the following address: Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue, N.W., Washington, DC 20420.

Paragraph (b) provides the information that must be included in a petition, including: (1) the petitioner's name and address; (2) information identifying the guidance document to which the petition pertains; and (3) a statement of the reasons the petitioner believes the document should be withdrawn or modified.

We are stating in paragraph (c) that VA will provide a response to such petition within 90 days of receipt of the request.

5.25 Guidance website.

Section 5.25 states that VA has a guidance website that contains, or links to, guidance documents that are currently in effect and that VA will not cite, use, or rely on any guidance document that is not posted on the website existing under E.O. 13891, except to establish historical facts. Section 5.25 further provides the address for the guidance portal that is required by section 3 of E.O. 13891. The guidance portal can be accessed at www.VA.gov/guidance.

Administrative Procedure Act

The Secretary of Veterans Affairs is publishing this rule without prior opportunity for public comment pursuant to 5 U.S.C. 553(b)(A) as this rule is a rule of agency organization, procedure, or practice, and thus is published as a final rule.

Paperwork Reduction Act

This rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the

Regulatory Flexibility Act, 5 U.S.C. 601-612. The regulations established by this rulemaking do not impose burdens or otherwise regulate the activities of any entities outside of VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Executive Orders 12866, 13563 and 13771

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). E.O. 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. OIRA has determined that this rule is not a significant regulatory action under E.O. 12866. VA's impact analysis can be found as a supporting document at <http://www.regulations.gov>, usually within 48 hours after the rulemaking document is published. Additionally, a copy of the rulemaking and its impact analysis are available on VA's website at <http://www.va.gov/orpm/>, by following the link for "VA Regulations Published From FY 2004 Through Fiscal Year to Date."

This final rule is not expected to be an E.O. 13771 regulatory action because this final rule is not significant under E.O. 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for

inflation) in any one year. This final rule would have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance

There are no Catalog of Federal Domestic Assistance numbers and titles for this rule.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), OIRA designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

List of Subjects in 38 CFR Part 5

Administrative practice and procedure

Signing Authority

The Secretary of Veterans Affairs approved this document on November 6, 2021, for publication and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Jeffrey M. Martin,
Assistant Director,
Office of Regulation Policy & Management,
Office of the Secretary,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs adds
38 CFR part 5 as follows:

PART 5 – Administrative Procedures: Guidance Documents

Sec.

5.0 Purpose.

5.10. Definitions relating to guidance documents.

5.15. Procedures for issuing guidance documents.

5.20. Procedures for petition for the withdrawal or modification of a guidance document

5.25. Guidance website.

Authority: 38 U.S.C. 501; E.O. 13891, 84 FR 55235.

§ 5.0 Purpose.

Sections 5.0 through 5.25 provide VA's processes and procedures for issuing
and managing guidance documents in accordance with Executive Order 13891.

§ 5.10 Definitions relating to guidance documents.

The following definitions apply to §§ 5.0 through 5.25.

Guidance document means an agency statement of general applicability (i.e., it
applies to more than just one person, event, or transaction), that is intended to have a
future effect on the behavior or actions of regulated parties (to include non-VA actors),
and that sets forth a policy on a statutory, regulatory, or technical issue, or an
interpretation of a statute or regulation. A guidance document does not include the
following:

(1) Rules promulgated pursuant to notice and comment under section 553 of title
5, United States Code, or similar statutory provisions;

(2) Rules exempt from rulemaking requirements under section 553(a) of title 5,
United States Code;

(3) Rules of agency organization, procedure, or practice;

(4) Decisions of agency adjudications under section 554 of title 5, United States
Code, or similar statutory provisions;

- (5) Internal guidance directed to the issuing agency or other agencies that is not intended to have substantial future effect on the behavior of regulated parties; or
- (6) Internal executive branch legal advice or legal opinions addressed to executive branch officials.

Significant guidance document means a guidance document that the Administrator of the Office of Information and Regulatory Affairs determines is reasonably anticipated to:

- (1) Lead to an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles of Executive Order 12866.

VA means the Department of Veterans Affairs.

§ 5.15 Procedures for issuing guidance documents.

(a) *General.* (1) Each guidance document must clearly and prominently state that it does not bind the public, except as authorized by law or as incorporated into a contract. Guidance documents may include the following or similar disclaimer language: The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

(2) Each guidance document must include the following information in the published guidance document:

- (i) The term guidance;
- (ii) The agency or office issuing the document;
- (iii) To what and to whom the document applies;
- (iv) The date of issuance;
- (v) The title and unique identification number of the document;
- (vi) Citation to statutory or regulatory authority that the guidance document interprets or applies;
- (vii) A short summary of the subject matter covered at the beginning of the guidance document;
- (viii) The statement required under paragraph (a)(1) of this section; and
- (ix) As applicable, the guidance document being revised or replaced.

(b) *Significant guidance documents.* We will refer to the Administrator of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget, or the Administrator's designee, the question of whether a guidance document is significant. Significant guidance documents must follow the requirements provided in paragraph 5.15(a). Additionally, unless the Administrator of OIRA, pursuant to review under E.O. 12866, and VA agree that exigency, safety, health, or other compelling cause warrants an exemption, the following additional procedures apply:

(1) VA will provide for a period of public notice and comment of at least 30 days before issuance of such significant guidance document and will provide a public response to major concerns raised in comments, except when VA for good cause finds (and incorporates such finding and a brief statement of reasons therefor into the guidance document) that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest.

(2) The Secretary or a VA component head appointed by the President (with or without confirmation by the Senate), or by an official who is serving in an acting capacity as either of the foregoing, must approve any significant guidance document prior to issuance; pursuant to section 4(a)(iii)(B) of Executive Order 13891, this approval authority is not delegable.

(3) Significant guidance documents must be submitted to OIRA for review under Executive Order 12866 prior to issuance.

(4) Significant guidance documents must comply with the applicable requirements for regulations or rules set forth in Executive Orders 12866, 13563, 13609, 13771, and 13777.

§ 5.20 Procedures for petition for the withdrawal or modification of a guidance document.

Petitions for withdrawal or modification of a guidance document. The following procedures apply for the public to petition for withdrawal or modification of a guidance document.

(a) A member of the public wishing to petition for withdrawal or modification of a guidance document may submit such petition via email to: OEIDMO@va.gov. Petitions may also be mailed to the following address: Office of Policy and Interagency Collaboration, Office of Enterprise Integration, 810 Vermont Avenue, N.W., Washington, DC 20420.

(b) A petition for withdrawal or modification of a guidance document must contain the following information:

- (1) The petitioner's name and address;
- (2) Information identifying the guidance document to which the petition pertains;
- (3) A statement of the reasons the petitioner believes the document should be withdrawn or modified.

(c) VA will provide a response to a petition within 90 days of receipt of the request.

§ 5.25 Guidance website.

VA has a guidance website that contains, or links to, guidance documents that are currently in effect. VA will not cite, use, or rely on any guidance document that is not posted on the website existing under Executive Order 13891, except to establish historical facts. The website can be found at the following address:

www.VA.gov/guidance.